Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: July 21, 2004 **Released:** August 20, 2004

Comment Date: [21 Days after publication in the Federal Register]
Reply Comment Date: [36 Days after publication in the Federal Register]

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioner Martin issuing a separate statement at a later date; Commissioners Copps and Adelstein dissenting and issuing separate statements.

I. INTRODUCTION

1. Today, we issue a Notice of Proposed Rulemaking (Notice) in which we solicit comment on alternative unbundling rules that will implement the obligations of section 251(c)(3) of the Communications Act of 1934, as amended,[1] in a manner consistent with the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *United States Telecom Ass'n v. FCC*.[2] We also issue an Order in which we take several steps designed to avoid disruption in the telecommunications industry while these new rules are being written. The actions we take today are designed to advance the Commission's most important statutory objectives: the promotion of competition and the protection of consumers. If the Commission does not act, the $127 billion local telecommunications market will unnecessarily be placed at risk. To that end, we set forth a comprehensive twelve-month plan consisting of two phases to stabilize the market. First, on an interim basis, we require incumbent local exchange carriers (LECs) to continue providing unbundled access to switching,[3] enterprise market loops, and dedicated transport[4] under the same rates, terms and conditions

[1] We refer to the Communications Act of 1934, as amended, *inter alia*, by the Telecommunications Act of 1996, as the Communications Act or the Act. *See generally* 47 U.S.C. § 151 *et seq.*

[2] 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). *See also United States Telecom Ass'n v. FCC*, No. 00-1012, Order, (D.C. Cir. Apr. 13, 2004) (granting a stay of the court's mandate through June 15, 2004) (*USTA II Stay Order*). The *USTA II* mandate issued on June 16, 2004.

[3] Throughout this Notice and Order, references to unbundled switching encompass mass market local circuit switching and all elements that must be made available when such switching is made available.

that applied under their interconnection agreements[5] as of June 15, 2004.[6] These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements. Second, we set forth transitional measures for the next six months thereafter. Under our plan, in the absence of a Commission holding that particular network elements are subject to the unbundling regime, those elements would still be made available to serve existing customers for a six-month period, at rates that will be moderately higher than those in effect as of June 15, 2004.

2. The one-year transitional regime described above is designed to provide a reasonable timeframe for the Commission to complete its work while interim protections remain in place. Eight years after the initial implementation of the local competition provisions of the Act, the Commission continues to search for unbundling rules that identify where carriers are genuinely impaired and where overbroad unbundling works to frustrate sustainable, facilities-based competition. As the Commission has repeatedly recognized, our primary goal in implementing section 251 is to advance the development of facilities-based competition.[7] We believe that unbundling rules based on a preference for facilities-

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[4] The D.C. Circuit did not make a formal pronouncement regarding the status of the Commission's findings regarding enterprise market loops. Some carriers have taken the position that those rules have been vacated. *See, e.g.*, Letter from Jerry Hendrix, Assistant Vice President Interconnection Services, BellSouth, to Stephen G. Huels, Region Vice President, AT&T (Apr. 30, 2004) *in* Letter from David Lawson, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at attach. 7 (filed May 7, 2004) ("The D.C. Circuit Order explicitly vacated the Federal Communications Commission's (FCC) national impairment finding for DS1, DS3 and dark fiber elements. As a result, once vacatur becomes effective, ILECs will no longer have an obligation under Section 251 of the Act to offer these elements and, at that time, BellSouth will pursue the legal and regulatory options available to it."); Verizon Reply, CC Docket Nos. 01-338, 96-98, 98-147 at 5 (filed Apr. 5, 2004) ("Once the mandate in *USTA II* issues, ILECs will have no obligation to make high-capacity facilities available on an unbundled basis at all."). We do not take a position on that question here; but to ensure a smooth transition governed by clear requirements, we assume *arguendo* that the D.C. Circuit vacated the Commission's enterprise market loop unbundling rules.

[5] Throughout this Notice and Order, references to an incumbent LEC's obligations under its interconnection agreements apply also to obligations set forth in the incumbent LEC's applicable statements of generally available terms (SGATs) and relevant state tariffs.

[6] These obligations apply irrespective of whether an incumbent LEC has taken steps before or after this date to relieve itself of such obligations.

[7] *See Implementation Of The Local Competition Provisions Of The Telecommunications Act Of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3701, para. 7 (1999) (*UNE Remand Order*); *see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16984, para. 3 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020, 19021, paras. 12-13, 15, 17 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, affirmed in part, USTA II*, 359 F.3d 554 (discussing "the difficulties and limitations inherent in competition based on the shared use of infrastructure").

based competition will provide incentives for both incumbent LECs and competitors to innovate and invest. Accordingly, as we initiate this remand proceeding, we renew our commitment to promoting the development of facilities-based competition and seek to adopt unbundling rules that will achieve this end.

II. BACKGROUND

3. The Act requires that incumbent LECs provide unbundled network elements (UNEs) to other telecommunications carriers. In particular, section 251(c)(3) requires incumbent LECs to provide to requesting telecommunications carriers "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252."[8] Section 251(d)(2)(B) authorizes the Commission to determine which elements are subject to unbundling, and directs the Commission to consider, "at a minimum," whether access to proprietary network elements is "necessary" and whether failure to provide a *non*-proprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide service.[9] Section 252, in turn, requires that those network elements that must be offered pursuant to section 251(c)(3) be made available at cost-based rates.[10]

4. The Commission first addressed the unbundling obligations of incumbent LECs in the *Local Competition Order*, which, among other things, adopted rules designed to implement the requirements of section 251, establishing a list of seven UNEs which incumbent LECs were obliged to provide.[11] In 1997, the U.S. Court of Appeals for the Eighth Circuit affirmed some parts of the *Local Competition Order* and reversed others.[12] The Commission, MCI, AT&T, and various incumbent LECs appealed different portions of that decision. In January 1999, the Supreme Court (1) affirmed the Commission's general authority to adopt unbundling rules to implement the 1996 Act, (2) vacated the specific unbundling rules at issue, (3) instructed the Commission to revise the standards under which the unbundling obligation is determined, and (4) required the Commission to reevaluate which network elements were subject to unbundling under the revised standard.[13]

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[8] 47 U.S.C. § 251(c)(3).

[9] 47 U.S.C. § 251(d)(2)(B).

[10] *See id.* § 252(d)(1).

[11] The seven network elements set forth in the *Local Competition Order* were: (1) local loops; (2) network interface devices; (3) local and tandem switching; (4) interoffice transmission facilities; (5) signaling networks and call-related databases; (6) operations support systems; and (7) operator services and directory assistance. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15616-775 (1996) (*Local Competition Order*) (subsequent history omitted).

[12] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

[13] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In reaching this conclusion, the Court held that the Commission had not adequately considered the "necessary" and "impair" standards of section 251(d)(2) in establishing the list of seven network elements. *Id.* at 387-92.

5. In November 1999, the Commission responded to the Supreme Court's remand by issuing the *UNE Remand Order*, in which it reevaluated the unbundling obligations of incumbent LECs and promulgated new unbundling rules, pursuant to the Court's direction.[14] The D.C. Circuit granted petitions for review, and in *United States Telecom Ass'n v. FCC*, it vacated and remanded the portions of the *UNE Remand Order* interpreting the statute's "impair" standard and establishing a list of mandatory UNEs. The court also vacated and remanded the Commission's line sharing requirements.[15]

6. In December 2001, prior to the D.C. Circuit's issuance of *USTA I*, the Commission released the *Triennial Review NPRM*, seeking comment regarding how, if at all, the unbundling regime should be modified to reflect market developments since issuance of the *UNE Remand Order*.[16] Following *USTA I*, the Commission asked commenters responding to the *Triennial Review NPRM* to address the issues raised in that decision.[17] In the *Triennial Review Order*, based on the record compiled in response to the *Triennial Review NPRM*, the Commission adopted new unbundling rules implementing section 251 of the 1996 Act.[18] The *Triennial Review Order* reinterpreted the statute's "impair" standard and reevaluated incumbent LECs' unbundling obligations with regard to particular elements. Various parties appealed the *Triennial Review Order*, and, on March 2, 2004, the D.C. Circuit decided *USTA II*, vacating and remanding several of the *Triennial Review Order*'s unbundling rules.[19] The *USTA II* court directed that the decision's mandate would issue no later than the later of May 2, 2004 or the denial of any rehearing or rehearing *en banc*.[20]

7. On March 31, 2004, the Commission unanimously called on industry participants to engage in "good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements."[21] To help facilitate this period of negotiations, the Commission requested, and subsequently received, an extension of the *USTA II* mandate from the D.C. Circuit through June 15, 2004.[22] To date there have been numerous commercial agreements reached between

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[14] *UNE Remand Order*, 15 FCC Rcd 3696 (1999).

[15] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I*).

[16] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001).

[17] *See Wireline Competition Bureau Extends Reply Comment Deadline For The Triennial Review Proceedings*, CC Docket No. 01-338, Public Notice, 17 FCC Rcd 10512 (WCB 2002).

[18] *Triennial Review Order*, 18 FCC Rcd at 17155-75, 17199-223, 17263-79, paras. 298-327, 359-93, 459-79.

[19] *USTA II*, 359 F.3d at 564-76. In addition, the court upheld the Commission with respect to a number of elements, including broadband loops, hybrid loops, enterprise switching, as well as the section 271 access obligation.

[20] *Id.* at 595.

[21] *Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on Triennial Review Next Steps* (rel. Mar. 31, 2004).

[22] *See generally USTA II Stay Order.*

incumbent LECs and competing carriers.[23] The court later denied a Commission request to further stay the mandate, and, on June 14, 2004, Supreme Court Chief Justice Rehnquist denied competitive LECs' petitions for stay of the D.C. Circuit mandate.[24] The *USTA II* mandate thus issued on June 16, 2004.[25] In letters sent to the Commission in the days leading up to June 16, each of the four Bell Operating Companies (BOCs) indicated its willingness to take limited action to protect the market as the Commission fashions new rules, though these commitments differ both in their scope and in their duration.[26]

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[23] *See, e.g.*, MCI, *MCI and Qwest Reach Commercial Agreement for Wholesale Services*, Press Release (May 31, 2004), available at http://global.mci.com/news/news2.xml?newsid=10710&mode=long&lang=en&width=530&langlinks=off; SBC, *SBC, Sage Telecom Reach Wholesale Telecom Services Agreement*, Press Release (Apr. 3, 2004), available at http://www.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=21080; *BellSouth in Deals with Four Carriers; CLEC Group Cries Foul on Deadline*, TR DAILY (May 5, 2004) (describing BellSouth's commercial agreements with ABC Telecom, INET, KingTel, and WebShoppe); BellSouth, *BellSouth Signs Contracts for Long-Term Commercial Agreements with Three Wholesale Carriers*, Press Release (Apr. 29, 2004), available at http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=45448 (describing BellSouth's commercial agreements with Dialogica Communications Inc., International Telnet, and CI2); Verizon, *Verizon and Granite Telecommunications Sign Binding Letter of Intent for Commercial Agreement on Wholesale Services*, Press Release (June 15, 2004), available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85517; Verizon, *Verizon Entering Into Commercial Agreement With A Wholesale Customer*, Press Release (June 18, 2004), available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85593 (describing Verizon's commercial agreement with Sterling Telecommunications); *Verizon Reaches Tentative Pact with CLEC for Network Access*, TR DAILY, (Apr. 23, 2004) (describing Verizon's commercial agreement with DSCI); *Wireline*, COMMUNICATIONS DAILY (May 19, 2004) (describing Verizon's commercial agreement with InfoHighway).

[24] *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (June 4, 2004) (order denying stay of mandate).

[25] Several parties have sought Supreme Court review of the *USTA II* decision. *See* National Association of Regulatory Utility Commissioners and the Arizona Corporation Commission, Petition for a Writ of Certiorari, No. 04-12 (June 30, 2004); AT&T Corp., *et al.*, Petition for a Writ of Certiorari, No. 04-15 (June 30, 2004); People of the State of California, *et al.*, Petition for a Writ of Certiorari, No. 04-18 (June 30, 2004).

[26] SBC states that it will "continue providing to [its] wholesale customers the mass market UNE-P, loops and high-capacity transport between SBC's offices and will not unilaterally increase the applicable state-approved prices for these facilities at least through the end of this year." Letter from Edward E. Whitacre Jr., Chairman and CEO, SBC, to Michael K. Powell, Chairman, FCC (filed June 9, 2004) (*SBC Commitment Letter*). BellSouth states that it "will not unilaterally increase the prices it charges for the mass market UNE-Platform or high-capacity loop or transport UNEs before January 1, 2005 for those carriers with current interconnection agreements." Letter from F. Duane Ackerman, Chairman and CEO, BellSouth Corp., to Michael K. Powell, Chairman, FCC (filed June 10, 2004) (*BellSouth Commitment Letter*). Verizon asserts that until it "will continue to provide wholesale access to [its] narrowband network" and will "not unilaterally increase the wholesale price [it] charge[s] for UNE-P arrangements that are used to serve" customers with three lines or fewer before November 11, 2004. Letter from Ivan Seidenberg, Chairman and CEO, Verizon, to Michael K. Powell, Chairman, FCC (filed June 11, 2004). Finally, Qwest "pledge[s] not to raise UNE-P rates for the remainder of the year." Letter from Richard C. Notebaert, Qwest, to Michael K. Powell, Chairman, FCC (filed June 14, 2004). All letters cited in this Order have been filed in CC Docket No. 01-338.

III. NOTICE OF PROPOSED RULEMAKING

8. The *USTA II* court, *inter alia*, vacated the Commission's delegation of authority to state commissions to engage in further granular impairment analyses;[27] vacated the Commission's distinction between "qualifying" and "non-qualifying" services;[28] vacated and remanded the nationwide impairment findings for mass market switching and dedicated transport;[29] and, in the context of reviewing the Commission's findings on dedicated transport, vacated and remanded the failure by the Commission to consider alternative network access arrangements, such as tariffed offerings, offered by incumbent LECs.[30] Importantly, the D.C. Circuit also remanded, but did not vacate, other portions of the *Triennial Review Order*, including the exclusion of entrance facilities from an impairment analysis.[31] Moreover, the D.C. Circuit called into question certain aspects of the Commission's unbundling framework, including the "open-endedness" of the Commission's "touchstone" of impairment – uneconomic entry – and the Commission's treatment of impairment in relation to universal service cross-subsidies.[32]

9. We seek comment on how to respond to the D.C. Circuit's *USTA II* decision in establishing sustainable new unbundling rules under sections 251(c) and 251(d)(2) of the Act.[33] As an initial matter, we seek comment on the changes to the Commission's unbundling framework that are necessary, given the guidance of the *USTA II* court. To that end, we seek comment on how various incumbent LEC service offerings and obligations, such as tariffed offerings and BOC section 271 access obligations, fit into the Commission's unbundling framework.[34] Moreover, we seek comment on how best to define relevant markets (*e.g.*, product markets, geographic markets, customer classes) to develop rules that account for market variability and to conduct the service-specific inquiries to which *USTA II* refers.[35] Also, we seek comment on how to respond to the D.C. Circuit's guidance on other threshold factors, including the relationship between universal service support and UNEs.

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[27] *USTA II*, 359 F.3d at 565-68, 573-74, 594.

[28] *USTA II*, 359 F.3d at 591-92, 594.

[29] *USTA II*, 359 F.3d at 568-71, 574-75, 594. As stated above, for purposes of this proceeding, we assume *arguendo* that the D.C. Circuit also vacated the Commission's findings regarding enterprise market loops. *See supra note* 4.

[30] *USTA II*, 359 F.3d at 577 ("We therefore hold that the Commission's impairment analysis must consider the availability of tariffed ILEC special access when determining whether would-be entrants are impaired."); *see also id.* at 575-77, 592, 594.

[31] *USTA II*, 359 F.3d at 585-86, 594.

[32] *USTA II*, 359 F.3d at 571-73.

[33] 47 U.S.C. §§ 251(c), (d)(2).

[34] *See, e.g., USTA II*, 359 F.3d at 575-77, 588-90, 592, 594 (discussing the relevance of incumbent LEC service offerings to unbundling determinations, as well as BOC section 271 access obligations).

[35] *See, e.g., USTA II*, 359 F.3d at 575-577, 591-92 (requiring Commission to analyze impairment for all "telecommunications services" and suggesting that the impairment analysis must account for specific characteristics of the market in which a particular requesting carrier operates).

10. Below, we set forth a two-phase plan to govern the provision of unbundled switching, dedicated transport and enterprise market loops over the next twelve months.[36] In the absence of such a plan, existing UNE arrangements might be terminated prematurely without an orderly transition mechanism in place. Such an abrupt result would be inimical to competition and its benefits for consumers, and thus would be inconsistent with the public interest. Thus, we set forth below a plan that (1) ensures continued availability over the next six months of elements provided under interconnection agreements as of June 15, 2004 and (2) mitigates, during the next six-month period thereafter, the disruption that might otherwise ensue in the absence of a Commission finding that any or all of those elements are subject to unbundling.[37] Are there circumstances in which particular final rules would necessitate additional transition mechanisms apart from or beyond this second six-month phase? For example, we seek comment on what additional transition mechanisms, if any, would help to prevent service disruptions during cut-overs from UNE facilities to a carrier's own (or third-party) facilities, or for conversions to tariffed or other service arrangements, and would be consistent with the court's decision.

11. Moving beyond the threshold unbundling issues, we seek comment on how to apply the Commission's unbundling framework to make determinations on access to individual network elements. Thus, we seek comment, including evidence at a granular level, on which specific network elements the Commission should require incumbent LECs to make available as UNEs in which specific markets, consistent with *USTA II*, and how the Commission should make these determinations. Further, we invite parties to comment on any other issues the Commission should address in light of *USTA II*.[38] We also incorporate into this Notice the Commission's 2001 *Triennial Review NPRM*, rather than restating similar proposals and questions, to the extent that they remain relevant.[39] Commenters should address

[36] *See generally infra* Section IV.

[37] *See infra* paras. 29-30.

[38] For example, because the Commission's hybrid loop unbundling rules changed the extent to which and the ways in which requesting carriers may access subloops pursuant to section 251(c)(3), we invite parties to refresh the record assembled in response to the *Second Further Notice* in the *Advanced Services* proceeding regarding collocation at remote incumbent LEC premises. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking and Fifth Further Notice, 15 FCC Rcd 17806, 17851-54, paras. 103-12 (2000) (*Second Further Notice*) (subsequent history omitted). Similarly, we seek comment on whether and how we should clarify our rules regarding access to customers served by integrated digital loop carrier equipment in a manner that promotes facilities-based deployment. *See, e.g.*, Letter from Tina M. Pidgeon, Vice President, Federal Regulatory Affairs, GCI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed July 1, 2004). Furthermore, because we have received petitions regarding the details of the independent section 271 unbundling obligations, we seek comment on whether these obligations need to be clarified or modified in light of *USTA II*. *See* BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action, WC Docket No. 04-245 (filed July 1, 2004) (petitioning the Commission to assert exclusive jurisdiction over the enforcement of section 271 and preempt a state commission ruling asserting jurisdiction).

[39] *Triennial Review NPRM*, 16 FCC Rcd 22781. For example, the Commission sought comment on the relationship between UNEs and tariffed offerings, as well as BOC section 271 access obligations. *See id.* at 22801-02, 22814-15, paras. 44, 72, 75. The Commission also sought comment on various market definitions including service and geographic markets. *See id.* at 22797-802, paras. 34-46. On May 30, 2002, the Commission extended the reply comment due date to allow parties to respond to the D.C. Circuit's analysis in *USTA I*. *See Wireline Competition Bureau Extends Reply Comment Deadline for the Triennial Review Proceedings*, CC Docket No. 01-338, Public (continued....)

the questions posed in the *Triennial Review NPRM* to the extent the questions remain valid after *USTA I* and *USTA II*.

12. We intend to draw on our experiences with both the 1996 Act and the rules adopted in the *Triennial Review Order* to inform our unbundling analysis. Since the Commission released the *Triennial Review Order*, parties have identified many interrelated issues through petitions, requests for waivers, and *ex parte* communications. We describe these proceedings below and we hereby incorporate the pleadings, comments, and *ex parte* communications of these proceedings into this docket. We first incorporate the record generated by the petitions for reconsideration and clarification of the *Triennial Review Order*, including discussion of issues such as broadband unbundling requirements, section 271 access obligations, and access to signaling.[40] Next, we incorporate the record developed in response to a petition by BellSouth for temporary waiver of the Commission's rules regarding enhanced extended links (EELs).[41]

13. Additionally, we incorporate three petitions regarding incumbent LEC obligations to file commercial agreements, under section 252 of the Act, governing access to network elements for which there is no section 251(c)(3) unbundling obligation.[42] To that end, should we properly treat commercially negotiated agreements for access to network elements that are not required to be unbundled pursuant to section 251(c)(3) under section 252, section 211, or other provisions of law?

14. Finally, we incorporate into the record a petition filed by Qwest for rulemaking to adopt interim unbundling rules following the *USTA II* decision.[43] The issues raised in these various proceedings are suitable for consideration in this proceeding because the information we receive or have received associated with these proceedings will help inform our analysis of incumbent LEC unbundling obligations.

15. Given that our inquiry raises complex issues, and proceedings that state commissions initiated to implement the *Triennial Review Order* developed voluminous records containing information potentially relevant to our inquiry, we anticipate that parties might wish to submit much of that same

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Notice, 17 FCC Rcd 10512 (WCB 2002). We do not, however, incorporate the record from the *Triennial Review* proceeding.

[40] *See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 2635 (Oct. 9, 2003); 68 Fed. Reg. 60391 (2003).

[41] BellSouth Telecommunications, Inc., Petition for Waiver, CC Docket Nos. 01-338, 96-98, 98-147 (filed Feb. 11, 2004).

[42] SBC Communications, Inc., Emergency Petition for Declaratory Ruling, Preemption, and Standstill, WC Docket No. 04-172 (filed May 3, 2004); BellSouth, Emergency Petition for Declaratory Ruling (filed May 27, 2004); BellSouth, Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Section 252 with Respect to Non-251 Agreements (filed May 27, 2004).

[43] Petition of Qwest Communications International Inc. for Rulemaking (filed March 29, 2004) (proposing a set of interim rules, including pricing limitations, for unbundled switching, shared transport, dedicated transport, and enterprise loops for the time period between vacatur of some of the Commission's unbundling rules and adoption of final rules).

factual evidence to support their positions here. To be sure, the state commissions' dedication in executing the difficult tasks set out for them in our *Triennial Review Order* was impressive, and we appreciate their efforts. To make the records from state proceedings more usable, we encourage state commissions and other parties to file summaries of the state proceedings, especially highlighting factual information that would be relevant under the guidance of *USTA II*. Similarly, we encourage state commissions and other parties to summarize state commission efforts to develop batch hot cut processes. To avoid duplicative filings, we encourage parties (particularly the state commissions and parties participating in the state proceedings) to coordinate with one another regarding the filing of that information. Otherwise, parties generally shall not incorporate merely by reference entire documents or significant portions of documents that were filed in other proceedings in this or other dockets, or in state proceedings or elsewhere. Rather, the parties must provide a complete recitation in their current filings of any arguments or data that they wish the Commission to consider.[44] Moreover, parties making factual submissions shall provide the underlying data, analysis and methodologies necessary to enable the Commission and commenters to evaluate the factual claims meaningfully, including a discussion of the basis upon which data were included or excluded.[45] Further, to minimize the burden and time associated with determining parties' positions, we require parties to make all substantive legal and policy arguments in their comments, reply comments, or *ex parte* filings, rather than only raising them in supporting materials.[46] We explicitly warn parties that these requirements are being put into place to ensure that the issues in this proceeding are fully and fairly presented within the severe constraints placed on the Commission by the necessity of formulating permanent rules quickly.

IV. ORDER

16. Although we initiate a new proceeding to craft final unbundling rules that address the requirements of *USTA II*, we find that the pressing need for market certainty until we issue final unbundling rules warrants the implementation of a plan that will preserve for six months certain obligations as they existed on June 15, 2004, and then, during a subsequent six-month period, permit competitive LECs to access from incumbent LECs certain network elements at increased rates. Specifically, we conclude that the appropriate interim approach here is to require incumbent LECs to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements. Our plan further contemplates a second six-month period during which competitive carriers would retain access to network elements that the

[44] *Cf. Updated Filing Requirements for the Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 17 FCC Rcd 14670, 14674 (Com. Car. Bur. 2001) (discussing requirements for filings made in section 271 proceedings).

[45] *Cf. id.* at 14675 (discussing the requirements for performance data submitted in support of a section 271 application).

[46] *Cf. id.* at 14673.

Commission has not subjected to unbundling, but only for existing customers and at transitional rates that are modestly higher than those available on June 15, 2004.

17. We emphasize at the outset that the twelve-month transition described herein is essential to the health of the telecommunications market and the protection of consumers. While carriers can address short-term instability through negotiated modification of interconnection agreements, it appears that the change of law provisions found in carriers' interconnection agreements vary widely. While some agreements provide for periods of renegotiation in which parties would work to amend them, others immediately invalidate the affected provisions while renegotiations are proceeding.[47] There is credible evidence before us that some incumbents have informed competitive LECs of their intention to initiate proceedings to curtail their UNE offerings,[48] and that at least one BOC has announced its intention to withdraw certain UNE offerings immediately.[49] While such actions are permitted under the court's holding in *USTA II*, they would likely have the effect of disrupting competitive provision of telecommunications services to millions of customers.[50] Moreover, whether competitors and incumbents would seek resolution of disputes arising from the operation of their change of law clauses here, in federal court, in state court, or at state public utility commissions, and what standards might be used to resolve such disputes, is a matter of speculation. What is certain, however, is that such litigation would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible. Therefore, consistent with our statutory mandate to protect the public interest, we adopt the following interim and transition requirements.

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[47] *See* Letter from John Windhausen, Jr., President, ALTS, to Michael Powell, Chairman, FCC at 1-2 (filed June 23, 2004) (*ALTS June 23 Letter*).

[48] *See ALTS June 23 Letter* at 2 (noting that BellSouth has informed state commissions of its intent to immediately invoke change of law provisions and to eliminate language concerning certain UNEs, and that Qwest has provided competitive LECs with "formal notice" that it had begun formal processes to discontinue its provision of mass market switching, DS1, DS3, and dark fiber loops; and DS1, DS3, and dark fiber dedicated transport as UNEs); *see also* Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 3-4 (filed May 7, 2004) (asserting that BellSouth is attempting to repudiate its obligation to provide dedicated transport without first complying with the requirements of change of law provisions of existing interconnection agreements).

[49] *See ALTS June 23 Letter* at 1-2 (claiming that "[o]n June 18, Verizon began informing state commissions that, pursuant to the change of law' provisions of its interconnection agreements, Verizon can begin discontinuing providing loops, switching and transport immediately"). We note that this action is inconsistent with written representations made by the BOCs before the D.C. Circuit and the Supreme Court when opposing a further stay of the *USTA II* mandate. In that context, the BOCs argued that the change of law provisions in existing contracts contained "orderly procedures . . . to transition away from the current regime of maximum unbundling." Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 at 15 (June 1, 2004). *See also* Opposition of ILECs to Applications for Stay, *NARUC v. USTA*, Sup. Ct. Nos. 03-A1008 & 03-A1010 at 30-32 (June 14, 2004).

[50] As of December 2003, competitive LECs served 19.4 million local customers using UNEs. IATD, *Local Telephone Competition: Status as of December 31, 2003*, Table 4 (rel. June 2004), available at <http://www.fcc.gov/wcb/iatd/stats.html>. Total revenues from local telecommunications service for 2002 were $127 billion. IATD, *Telecommunications Industry Revenue Report*, Table 1 (rel. Mar. 17, 2004).

A. Interim Requirements

18. Our plan to issue revised unbundling rules on an expedited basis does not alone provide the requisite market stability in the near term. The absence of clear rules, as stated above, threatens to disrupt the business plans of competitive carriers and their service to millions of customers that rely on competitive service offerings. This is a risk to the public interest too great to bear unheeded.[51] The public interest is best served by clarity with regard to the rates, terms and conditions under which network elements must be made available to requesting carriers.

19. The BOC commitment letters mentioned above themselves acknowledge the importance of "ensur[ing] stability and continuity" during this period and confirm the importance of "an orderly transition for consumers."[52] Although the BOCs have voluntarily agreed to many of the legal obligations imposed by this Order, we find that their commitment letters alone will not provide the requisite stability as the Commission works on permanent rules consistent with *USTA II*. First, the letters commit to different types of arrangements. For example, while SBC and BellSouth make commitments regarding transport and enterprise market loops, Verizon and Qwest do not, and in fact have declared their intentions to raise prices for these inputs. Second, the letters commit to differing time periods. While SBC, BellSouth and Qwest note that their commitments remain effective through the close of this year, Verizon's commitment expires on November 11, 2004. Third, the commitments are expressed in terms subject to differing interpretations. For example, it is not clear whether the BOCs' commitments not to raise rates "unilaterally" require the negotiated consent of the competitor, or merely a state commission's invalidation of previous rates or terms in accordance with the relevant interconnection agreement's change of law provisions. Similarly, it is unclear whether the BOCs' commitments not to raise prices in the short term also preclude retroactive rate increases (*i.e.*, true-ups) upon the Commission's issuance of final rules.[53] Finally, we note that the letters bind only the BOCs, and not those non-BOC incumbent LECs that must provide unbundled network elements pursuant to the Act.[54]

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[51] We note that many industry participants and the U.S. Department of Commerce (Department of Commerce) have recognized the need for interim action to ensure market stability pending the issuance of permanent rules. Specifically, the Department of Commerce has asked the Commission to "act promptly using all methods at [its] disposal to protect consumers and ensure appropriate competitive access to local networks, including the rapid adoption of interim rules that will accomplish these goals," and urged us to prevent "wholesale rate increases for those network elements subject to the vacatur of the DC Circuit Court" for "the maximum legally sustainable transition period." Letter from Michael D. Gallagher, Acting Assistant Secretary for Communications and Information, United States Department of Commerce, to Michael K. Powell, Chairman, FCC (filed June 16, 2004). At least some competitive LECs have predicted "massive chaos" if BOCs "cease providing service to facilities-based providers and their customers." ALTS, *ALTS Not Satisfied with RBOC Letters to FCC Claiming to Maintain Status Quo*, Press Release (June 14, 2004), *available at http://206.161.82.210/NewsPress/061404%20PR%20on%20RBOC%20Letters.pdf.*

[52] *SBC Commitment Letter* at 1; *BellSouth Commitment Letter* at 1.

[53] It is also unclear whether the commitment letters extend only to the prices at which elements will be offered or, alternatively, whether the other terms and conditions that are inherent to the UNE regime are contemplated under those letters. We note that our UNE rules do not just encompass pricing terms but also other important terms and conditions that are important to the stability of the telecommunications market in the short term.

[54] Section 251(f) exempts many, but not all, non-BOC incumbent LECs from the unbundling obligations set forth in section 251(c)(3). *See* 47 U.S.C. § 251(f).

20. Thus, while we credit the BOCs' voluntary efforts, we must adopt a plan that will prevent a gap in the Act's federal unbundling regime in the period leading up to the effective date of the permanent rules that the Commission will promulgate later this year, and, will ease the transition to whatever new rules we adopt. As the D.C. Circuit has held, "[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule."[55] Our interim requirements will, during the first six months of our year-long plan, maintain existing unbundling obligations to minimize disruptive effects and marketplace uncertainty that otherwise would result from the abrupt elimination of particular unbundling requirements. As the D.C. Circuit has held, "[s]ubstantial deference must be accorded an agency when it acts to maintain the *status quo* so that the objectives of [related proceedings] will not be frustrated."[56] Here, the disruption that would accompany a chaotic transition period would undermine the very competition that was the objective of *USTA II*, and we thus exercise our authority to take interim action to protect the market during this transition period for a limited period lasting until no later than six months after Federal Register publication of this Order.

21. Specifically, we require that between the effective date of this Order and the effective date of the permanent unbundling rules that the Commission plans to issue before the close of 2004, incumbent LECs shall continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[57] These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements,[58] (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.[59] These interim requirements will only remain in place for six months after Federal Register publication of this Order, by which time we intend to issue permanent rules.

22. In order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements. To that end, we do not restrict such change-of-law proceedings

[55] *CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (citing *MCI v. FCC*, 750 F.2d at 141; *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002)).

[56] *MCI v. FCC*, 750 F.2d at 141.

[57] For purposes of evaluating carriers' obligations under this interim regime, we do not draw distinctions between obligations resulting from an interconnection agreement that was in effect on June 15, 2004 and obligations that were set forth in an expired agreement but that nevertheless still applied on June 15, 2004 (as a result, for example, of a contractual provision rendering the agreement's provisions enforceable after expiration in the absence of some other event, such as the execution of a new agreement).

[58] As noted above, *see supra* note 23, several parties have successfully negotiated agreements governing interconnection. We support such negotiations, and thus specifically craft these interim requirements to minimize the risk that they might nullify existing agreements or foreclose any future agreements.

[59] During this interim period, and only during this six-month interim period, these rates, terms and conditions must also be made available for provision of service to a competitive LEC's new customers.

from presuming an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements, but under any such presumption, the results of such proceedings must reflect the transitional structure set forth below.[60] In no instance, however, shall the rates, terms or conditions resulting from any such proceeding take effect before the earlier of (1) Federal Register publication of this Order or (2) the effective date of our forthcoming final unbundling rules. We also hold that competitive LECs may not opt into the contract provisions "frozen" in place by this interim approach. The fundamental thrust of the interim relief provided here is to maintain the *status quo* in certain respects without expanding unbundling beyond that which was in place on June 15, 2004. This aim would not be served by a requirement permitting new carriers to enter during the interim period.

23. Our approach here is, in several meaningful respects, different from a mere reinstatement of our vacated rules. Most significantly, the interim approach forecloses the implementation and propagation of the vacated rules. For various reasons, the vacated rules had generally not yet been translated into contractual agreements. Thus, by freezing in place carriers' obligations as they stood on June 15, 2004, we are in many ways preserving contract terms that *predate* the vacated rules. Moreover, if the vacated rules were still in place, competing carriers could expand their contractual rights by seeking arbitration of new contracts, or by opting into other carriers' new contracts. The interim approach adopted here, in contrast, does not enable competing carriers to do either. Further, as described above, while we require incumbents to continue providing the specified elements at the June 15, 2004 rates, terms and conditions, we do *not* prohibit incumbents from initiating change of law proceedings that presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport, so long as they reflect the transition regime set forth below, and provided that incumbents continue to comply with our interim approach until the earlier of (1) Federal Register publication of this Order or (2) the effective date of our forthcoming final unbundling rules. Thus, whatever alterations are approved or deemed approved by the relevant state commission may take effect quickly if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order.[61]

24. Incumbent LECs and competitive LECs recently have both agreed that the Commission has the authority to adopt some form of interim rules, pending the expeditious completion of a proceeding crafting new permanent rules.[62] As we describe below, parties have proposed a variety of alternative approaches. We have considered these and other alternatives, but determine that none of them better promotes stability and minimizes harmful disruption in the telecommunications markets during the

[60] *See infra* paras. 29-30.

[61] *See infra.* para. 29. We also note that the interim regime imposes unbundling obligations that are no greater than the requirements incumbent LECs currently operate under – and, in many cases, have voluntarily agreed to continue. Indeed, the BOCs themselves have argued to the D.C. Circuit and the Supreme Court that existing change of law provisions contain "orderly procedures . . . to transition away from the current regime of maximum unbundling." Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012, June 1, 2004, at 15; *see also* Opposition of ILECs to Applications for Stay, *NARUC v. USTA*, Sup. Ct. Nos. 03-A1008 & 03-A1010, June 14, 2004, at 30-32.

[62] *See ALTS June 23 Letter* at 2-3; Letter from Richard S. Whitt, Senior Director, Federal Law and Policy, MCI, to Michael K. Powell, Chairman, FCC, *et al.* at 4 (filed June 25, 2004); Letter from Michael Kellogg, Counsel for United States Telecom Association, to John A. Rogovin, General Counsel, Federal Communications Commission at 2-3 (filed June 24, 2004).

transition to new permanent rules that are consistent with the *USTA II* decision. Both AT&T and ALTS, for example, suggest that the Commission consider enabling incumbent LECs to petition for waivers of any interim requirements requiring access to unbundled elements in certain circumstances. Recognizing that this subject matter is complicated and fact-intensive – particularly in a waiver process that seeks to address the range of concerns raised by the court in *USTA II* – we find that administrative resources will be best spent immediately addressing permanent rules, rather than perfecting a longer interim regime.

25. We also decline to make our interim rules subject to a "true-up," under which, for example, competing carriers would be required to pay back the difference between UNE and market-based rates if the Commission determines that a particular network element need not be unbundled under its permanent rules. This approach is tantamount to doing nothing at all, given the severity of the immediate financial impact it could have on competitive LECs. For accounting purposes, these carriers would likely have to begin to reserve – immediately and for every single element subject to dispute – the difference between the UNE prices temporarily in effect and the higher rates, such as special access pricing, to which those elements might ultimately (and, in the presence of a true-up, retroactively) be subjected. We also considered, but decline to adopt, an interim approach that precludes the addition of new customers; given the high rate of customer turn-over for services affected by these rules, we find that competitive LECs' ability to compete or even stay in business, using network elements that may be retained to some degree in permanent rules, would be severely compromised. Further, while we find it critical to provide carriers with the certainty of a near-term transitional pricing mechanism, we find it unnecessary to establish at this time a multi-year transitional mechanism, as requested by AT&T.

26. Moreover, we find that our interim approach, which preserves legal obligations as of June 15, 2004, is superior to the imposition of entirely new interim requirements. Temporary implementation of unfamiliar interim requirements would likely require changes to existing practices, possibly including costly and cumbersome alterations to incumbent LECs' operations and support systems, which might need to be reversed or further revised only months later when the final rules become effective. Moreover, any attempt to create and implement new unbundling rules that would be effective for only the brief interim period until the Commission adopts permanent rules would be administratively burdensome for both the Commission and industry participants. Finally, the temporary withdrawal of access to UNEs that the Commission ultimately might find to be subject to section 251(c)(3) would threaten irreparable – and perhaps debilitating – harm to competitive LECs, which rely on such elements to serve their customers, and which might well be unable to recapture customers lost during a UNE-free interim period. Thus, just like the absence of any rules at all, the implementation of a new interim approach could lead to further disruption and confusion that would disserve the goals of section 251.

27. Given the need for immediate interim action, the requirements set forth here shall take effect immediately upon Federal Register publication, and without prior public notice and comment. Commission rules permit us to render an order effective upon publication in the Federal Register where good cause warrants.[63] Similarly, section 553(b) of the Administrative Procedures Act (APA)[64] permits any agency to implement a rule without public notice and opportunity for comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary

[63] *See* 47 C.F.R. §§ 1.103(a), 1.427(b).

[64] 5 U.S.C. § 500 *et seq.*

to the public interest."[65] As a general matter, we firmly believe that public notice requirements are an essential component of our rulemaking process. Above, we seek comment regarding permanent rules on an expedited basis to ensure prompt implementation of the *USTA II* mandate. We find, however, that while receipt of public comment clearly is necessary to the formulation of final rules responsive to *USTA II*, there exists good cause to make this Order effective upon Federal Register publication and adopt the interim requirement described herein immediately.

28. We find such good cause for several reasons. First, concurrently with the action in this Order, the Commission is commencing a new proceeding, and is thus limiting the applicability of these interim requirements to only six months.[66] Second, immediate adoption of the interim approach, without prior notice and comment, serves the public interest. The interim requirements merely maintain unbundling obligations that have been governing the industry. Indeed, the obligation to unbundle switching, enterprise market loops, and transport has been in place for several years.[67] As described above, precipitate elimination of those requirements could destabilize the market and initiate negotiations that might, in some or all cases, be rendered null and void upon the Commission's issuance of final rules. Courts have upheld agencies' exercise of section 553(b) authority based on considerations such as the need to avoid "regulatory confusion" and industry disruption where parties have placed "considerable reliance" on the vacated rules.[68] These considerations are applicable here, and counsel prompt implementation of an interim requirement without prior notice and comment, effective upon publication of this Order in the Federal Register.

B. Twelve-Month Plan

29. Our commitment to providing certainty and steadiness in the market extends beyond the six-month interim period addressed above. We recognize that while certainty in the short term is critical, industry participants also require a clear understanding of how the regulatory landscape might change *after* our issuance of final rules. While we cannot and will not prejudge the important questions posed in the attached Notice, we believe the public interest would be served by a transition in the event that our final rules decline to require unbundled access to any element or elements that were available to requesting carriers as of June 15, 2004. Thus, our two-phase plan also contemplates a second six-month phase, to take effect in the absence of a Commission finding that specific elements that were made available to requesting carriers under the rules vacated by *USTA II* are reinstated. The entire twelve-month plan is as follows:

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[65] 5 U.S.C. § 553(b)(3)(B).

[66] *Mid-Tex Elec. Co-op., Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987).

[67] *See, e.g., UNE Remand Order*, 15 FCC Rcd at 3704, para. 15. In many cases, BOCs have already voluntarily agreed to adhere to much of the legal obligation we preserve here.

[68] *Mid-Tex v. FERC*, 822 F.2d at 1131-32; *see also* Amendment of Parts 80 and 87 of The Commission's Rules to Permit Operation of Certain Domestic Ship and Aircraft Radio Stations Without Individual Licenses, WT Docket No. 96-82, Notice of Proposed Rulemaking, 11 FCC Rcd 6353, 6354, paras. 12-13 (1996) (finding good cause to suspend a regulatory requirement without public notice, in part to avoid confusion and regulatory uncertainty in the affected industries).

- ***Interim period:*** Until the earlier of (1) six months after Federal Register publication of this Order or (2) the effective date of the final unbundling rules adopted by the Commission in the proceeding opened by the appended *Notice*, the interim approach described above will govern. Incumbent LECs shall continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place during the interim period, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.

- ***Transition period:*** For the six months following the interim period (that is, the six months following the expiration of the interim requirements on the earlier of six months after Federal Register publication of this Order or the effective date of the Commission's final unbundling rules), in the absence of a Commission ruling that switching, dedicated transport, and/or enterprise market loops must be made available pursuant to section 251(c)(3) in any particular case, we propose the following requirements, designed to protect incumbent LECs' interests while also guarding against the precipitous rate increases that might otherwise result. First, in the absence of a Commission ruling that switching is subject to unbundling, an incumbent LEC shall only be required to lease the switching element to a requesting carrier in combination with shared transport and loops (*i.e.*, as a component of the "UNE platform") at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for this combination of elements plus one dollar. Second, in the absence of a Commission ruling that enterprise market loops and/or dedicated transport are subject to section 251(c)(3) unbundling in any particular case, an incumbent LEC shall only be required to lease the element at issue to a requesting carrier at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for that element on June 15, 2004, or (2) 115% of the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for that element.[69] With respect to all elements at issue here, this transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates. As during the interim period, carriers shall remain free to negotiate alternative arrangements (including rates) superseding our rules (and state public utility commission rates) during the transition period.[70] Subject to the comments requested in response to the above NPRM, we intend to incorporate this second phase of the plan into our final rules.

[69] As noted above, we do not in any case preclude state commissions from imposing price increases greater than those specified in this Order. Moreover, we do not in any case prohibit carriers from entering into agreements contemplating other pricing arrangements.

[70] In no case, however, shall an incumbent carrier during this transition period charge a rate higher than the rate described here (*i.e.*, the June 15 rate plus one dollar for the UNE platform, or 115% of the June 15 rate for enterprise loops and/or dedicated transport) absent the negotiated consent of the competitor leasing the element or a state commission ruling expressly permitting the higher rate.

- ***Post-transition period***: After the transition period expires, incumbent LECs shall be required to offer on an unbundled basis only those UNEs set forth in our final unbundling rules, and subject to the terms and conditions set forth therein. The specific process by which those rules shall take effect will be governed by each incumbent LEC's interconnection agreements and the applicable state commission's processes.

30. We recognize that transition plans are always imperfect, as they by definition retain – temporarily – aspects of the regime being discarded. We believe, however, that the moderate price increases described above are both reasonable and necessary because they will mitigate the rate shock that could be suffered by competitive LECs in the first several months after the planned conclusion of our proceeding regarding final rules. At the same time, the time limitations applicable to these transitional limits on price increases will protect the interests of incumbent LECs in those situations where unbundling is not ultimately required.

V. PROCEDURAL MATTERS

A. Ex Parte Presentations

31. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[71] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[72] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

B. Comment Filing Procedures

32. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[73] interested parties may file comments within 21 days after publication of this Notice in the Federal Register and may file reply comments within 36 days after publication of this Notice in the Federal Register. All filings should refer to CC Docket No. 01-338 and WC Docket No. 04-313. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[74] Parties wishing to file significant amounts of data are encouraged to file copies of that data on CD-ROM in a searchable, read-only format, formatted in Microsoft Word, Microsoft Excel, PDF, or such other format as may be approved by the Wireline Competition Bureau. We note that the Wireline Competition Bureau has today adopted a

[71] 47 C.F.R. §§ 1.200 *et seq.*

[72] *See* 47 C.F.R. § 1.1206(b)(2).

[73] 47 C.F.R. §§ 1.415, 1.419.

[74] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998); Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

protective order under which commenters may file confidential materials in this proceeding if they so chose.[75]

33. Comments filed through ECFS can be sent in electronic form via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include a full name, postal service mailing address, and the applicable docket numbers, which in this instance are CC Docket No. 01-338 and WC Docket No. 04-313. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfshelp@fcc.gov, and should include the following words in the regarding line of the message: "get form<your e-mail address>." A sample form and directions will be sent in reply.

34. Parties who choose to file by paper must file an original and four copies of each filing. Parties filing by paper must also send five (5) courtesy copies to the attention of Janice M. Myles, Wireline Competition Bureau, Competition Policy Division, 445 12th Street, S.W., Suite 5-C327, Washington, D.C. 20554, or via e-mail janice.myles@fcc.gov. Paper filings and courtesy copies must be delivered in the following manner. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

35. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location last from 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. This facility is the only location where hand-delivered or messenger-delivered paper filings or courtesy copies for the Commission's Secretary and Commission staff will be accepted.

36. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

37. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

38. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

39. One copy of each filing must be sent to Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or online at www.bcpiweb.com.

40. Each comment and reply comment must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with

[75] This protective order matches that which the Bureau adopted for use in the *Triennial Review* proceeding. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, Order, 17 FCC Rcd 5852 (WCB 2002).